1989

The State of Utah v. John Timothy Singer : Reply Brief

Utah Court of Appeals

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890081-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 890081-CA
v.	:	
JOHN TIMOTHY SINGER,	:	Category No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

POINT I

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION FOR THE OFFENSE OF MANSLAUGHTER.

Appellee correctly states the standard that this court is to employ in reviewing the sufficiency of the evidence. Appellee contends that the issue was never raised following conviction. However, the sufficiency of the evidence was raised at the end of the State's case and denied by the trial court. (Tr. 12-14 p. 43) Consequently, the issue of the sufficiency of the evidence was raised at the trial court level. The issue was unquestionably raised for the trier of fact to consider.

Appellee argues that the evidence was sufficient to convict appellant of manslaughter. Appellee relies on the appellant's statement and the facts surrounding the shooting to show that appellant was aware of the risk of death to another and that he consciously disregarded that risk. Appellee contends

that appellant admitted that he was aware that officers were in the Bates' house at the time of the shooting. (Brief of appellee at p. 21) With respect to the gun shots, appellee's argument is that the pattern of shots and the recorded sounds of gunfire that were introduced into evidence indicate that appellant was shooting at people rather than the dogs. (Brief of appellee at pp. 22-23)

Agent Garcia, who took appellant's statement, testified that appellant denied seeing people in the Bates' house (Tr. 12-9 p. 85). Appellant did admit that "at best he saw movement in the Bate's house" (Tr. 12-9 p. 79-80). He had also stated that he observed the door to that house open (Tr. 12-9 p. 79-80). Garcia testified that appellant was questioned about the inferences that could be drawn from observing the movement and the door opening. (Tr. 12-9 p. 85) It was in answering those questions that appellant admitted his awareness of people being in the house. Appellee does not mention in its brief that the agents entered the Bates' house under cover of darkness and were attempting to conceal their presence from the Singer-Swapp family members. (Tr. 12-7 pp. 7-14) During the siege family members were observed in and around the Bates' house. (Tr. 12-2 pp. 235-237, 250-252) These facts corroborate appellant's lack of awareness of the presence of the agents in that house.

Appellee emphasizes that the pattern of bullet strikes indicates that appellant was not shooting at the dogs that had been released. Seven projectiles were located that were found to

have been fired from appellant's rifle. Of those projectiles four entered the door at the Bates' house when the door was partially open. (Tr. 12-13 pp. 251-252) Those are the strikes that make the pattern that appellee emphasizes. The other three strikes include one projectile that struck the Jeppson house and was ultimately located in Agent Don Robert's coat. (Tr. 12-8 pp. 17-32) One projectile ricocheted off the south side of the Bates' house and lodged in the Jeppson's automobile. The last is the projectile that struck and killed Lieutenant House. (Tr. 12-13 pp. 245-247). The totality of the circumstances indicate that the shots were spread over a four to five foot horizontal plane.[1] As discussed in appellant's opening brief, the height of the strikes of the projectiles is consistent with a person firing at dogs[2] moving in the area in front of the Bates' house rather than firing at people in that house.

Appellee also emphasizes the sequence of the shots as reflected in the videotape that was introduced into evidence. (Exhibit E-4) The grouping of the shots is correctly described in appellee's brief. This evidence must be considered in conjunction with all of the other evidence introduced at trial. As indicated by appellee, the first series, three shots, would have involved the projectiles that struck the Jeppson house,

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[1] See the diagram of the Bate's house in the addendum of appellant's opening brief.

[2] See appellant's opening brief at page 18.

ricocheted off the Bates' house and struck Lieutenant House. The second series, four shots, would have involved those projectiles that struck the door of the Bates' house. That sequence would be consistent with appellant shooting at a dog standing at a point higher in elevation than the doorway. If appellant would have been aiming at a lethal level the projectiles would have struck about fourteen inches higher than that level. This is because the sighting of the rifle, as described by Agent Crum, would have resulted in appellant's firing higher than his aim. (Tr. 12-13, p. 295) With this in mind, appellant would have had to been aiming at a point that would be in a person's upper leg area, rather than the lethal or upper body level described by appellee. Such a point would have been at the approximate height of the dogs.

Appellee contends that appellant was shooting at the agents in the Bate's house when he fired his rifle on January 28, 1988. However, considering the totality of the evidence that contention is improbable. It is much more reasonable that appellant was shooting at the dogs that were loosed to arrest the Swapp brothers. Likewise, the evidence is inconclusive and improbable as to appellant's awareness of the presence of agents in the Bates' house and his conscious disregard of that awareness. The evidence indicated that the agents had never been in the Bates' house before. The agents tried to secret themselves in the house and not reveal their presence to the Singer and Swapp families. (Tr. 12-7, p. 7-14) The best

evidence of appellant's awareness was that he observed the door open and saw movement in the Bates' house. (Tr. 12-9,. pp. 79-80) Appellant denied seeing people in the house. (Tr. 12-9, p. 85) At most, this evidence shows that appellant either failed to perceive or failed to recognize the risk of firing his rifle toward the Bates' house. In failing to perceive or recognize a risk, the appellant could be guilty of negligent homicide. State v. Dyer, 671 P.2d 142 (Utah, 1983). The situation in this case is indistinguishable from that in Dyer. In Dyer the defendant fired his rifle inside of his home. He was aware that his girlfriend was in the house, but was unaware that she was behind the wall at which he fired the rifle. The defendant was convicted of negligent homicide, and that conviction was affirmed on appeal.

The evidence in this case is sufficiently inconclusive and improbable that reasonable minds would entertain a reasonable doubt that the offense of manslaughter has been established. Consequently, that conviction must be reversed. State v. Booker, 709 P.2d 342 (Utah, 1985).

POINT II

APPELLANT'S STATEMENTS TO LAW ENFORCEMENT AGENTS MADE SUBSEQUENT TO HIS ARREST WERE INADMISSIBLE.

A.

APPELLANT'S STATEMENTS WERE NOT MADE VOLUNTARILY.

Appellee fails to address the issue raised by appellant with respect to the voluntariness of the confession. The position taken by appellant was that due to his particular mental condition and circumstances, appellant was a very vulnerable individual. (Brief of appellant at pp. 27-30) The statements and actions of the officers exploited that vulnerability in such a manner that the appellant's statements were not the product of a free and rational will. See: Miller v. Fenton, 474 U.S. 104 (1985).

Appellee's tactic was to address each factor individually and argue that factor in and of itself does not make the confession involuntary. Such a procedure is improper because the case law requires that the evidence must be considered in its totality. State v. Strain, 729 P.2d 221 (Ut. 1989) Circumstances that may be considered in determining the voluntariness of a confession include the age and intelligence of the defendant, the circumstances that invoked the conversation and the nature, import and content of statement. State v. Johnson, 83 P.2d 1010 (1938).

The critical aspect of the voluntariness of appellant's statements are those circumstances that invoked the confession. Of particular importance is the content of what appellee labels the "casual conversation" between the agents and appellent.[3] By getting appellant to talk about his father, appellant could

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[3] See: Brief of appellant at pp. 28-29.

undoubtedly be lead into a conversation about the bombing and shootout.[4]

As discussed in appellant's opening brief this method of questioning involved both trickery and coercion upon this particular appellant. That would render the confession involuntary and therefore inadmissible.

B.

THE AGENTS FAILED TO SCRUPULOUSLY HONOR APPELLANT'S ASSERTION OF HIS PRIVILEGE AGAINST SELF INCRIMINATION.

Appellee correctly focuses on the issue of whether the agents scrupulously honored appellant's assertion of his privilege against self incrimination. Appellant had been properly warned about his right to counsel and privilege against self incrimination. He then signed a waiver. Shortly after signing a waiver, appellant indicated that he did not want to talk to the agents. (R. 1476, p. 202) If the agents engaged in interrogation of appellant then the assertion of the privilege was not scrupulously honored. Miranda v. Arizona, 384 U.S. 436 (1986); Michigan v. Mosley, 423 U.S. 96 (1975).

"Interrogation" was defined in Rhode Island v. Innis, 446 U.S. 291 (1980), as express questioning or its functional equivalent. The functional equivalent of questioning is defined as words and actions by the officers that those officers should

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[4] See Point II. B., infra.

have known were reasonably likely to elicit an incriminating response. Appellee characterizes the exchange between the agents and appellant as "casual conversation." However, appellee never discussed the content of those conversations. Just because one party characterizes a verbal exchange as "casual conversation" does not make it such. The court must look to the content of the conversation to determine if it was merely something "casual" and voluntary or if it was interrogation.

As previously discussed the agents talked about their own families and expressed their confusion over the causes of the entire situation. (R. 1476, p. 216) All of the communications from the Singer household in the two previous weeks related to the death of appellant's father and how that incident related to the revelations that inspired the bombing and siege.[5] Enticing appellant into talking about his family in general and his father in particular would reasonably lead to statements about the bombing, siege and the shooting. Such a discussion would be reasonably likely to elicit an incriminating response. This "casual conversation" was the functional equivalent of express questioning. This "casual conversation" was therefore interrogation as described in Innis. The officers failed to scrupulously honor appellant's assertion of his privilege against self incrimination. The statements made as a result of that interrogation were inadmissible.

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[5] See footnote 12 in Appellant's opening brief.

CONCLUSION

The evidence was insufficient to support appellant's manslaughter conviction. This court should reverse that judgment and conviction and remand the case with an order for the district court to impose judgment for the offense of negligent homicide. The statements made by appellant to law enforcement officers were inadmissible. The judgment and conviction should be reversed and a new trial ordered for appellant.

DATED this 21 day of November, 1990.

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CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellant was mailed/delivered to Creighton C. Horton, II, Assistant Attorney General, at 236 State Capitol Building, Salt Lake City, Utah, 84114, this 21 day of November, 1990.